FIFTH COURT OF APPEALS

05-19-00280-CR

Ex parte Christopher Rion

On Appeal from Crim. Dist. Ct. No. 5 Dallas Co.
No. WX18-90101

Appellant's Brief

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Oral argument is not requested unless
the Court's decisional process will be aided

I. Identities of Parties, Counsel, and Judges

Christopher Rion, Appellant

Michael Mowla, attorney for Appellant at trial and on appeal

Kirk Lechtenberger, attorney for Appellant at trial

Katherine Haywood, attorney for Appellant at trial

State of Texas, Appellee

John Creuzot, Dallas County District Attorney

Faith Johnson, Dallas County District Attorney (at time of trial)

Susan Hawk, Dallas County District Attorney (when indictment was returned)

Brian Higginbotham, Dallas County Assistant District Attorney

Scott Wells, Dallas County Assistant District Attorney

Sable Taddesse, Dallas County Assistant District Attorney

Judge Carter Thompson, Presiding Judge of Crim. Dist. Ct. No. 5, Dallas Co.

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To the Honorable Justices of the Court of Appeals:

Appellant respectfully submits this Brief:

IV. Statement of the Case, Procedural History, and Statement of Jurisdiction

This appeal is a review of the Order signed on February 1, 2019 (CR.706)[1] in which the trial court denied Appellant's *Pretrial Application for Writ of Habeas Corpus Seeking Relief from Double Jeopardy, and in the alternative, a Motion for Continuance* (CR.91-128) ("Application").

The cause number of the proceedings below in the Application-proceeding is WX-90101. However, throughout this Brief, Appellant will refer to the case underlying this appeal (and writ-proceeding) by the trial cause number F15-72104 (CR.8) and "pending trial." Appellant will review to the case that gives rise to the Application by cause number (F15-71618) or as the "acquitted-case." (CR.89).

Because of the nature of this appeal, some procedural history is better discussed in the Facts below. Here it suffices to say that on March 1, Appellant filed a timely notice of appeal. (CR.709-710). The trial court certified that this case is not a plea-bargain case and Appellant has the right to an appeal from the denial of the Application. (CR.707). Thus, this Court has jurisdiction over this appeal.

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[1] The Clerk's Record is cited as "CR.__" or "CR-Supp.__" The Reporter's Record from companion trial court cause number F15-71618 is included in the Clerk's Record (CR.131-661) and will be cited as it appears by volume (i.e., RR1-RR6 followed by the page number) and by its location in the Clerk's Record. The court reporter also filed exhibits with this Court under State's Exhibit 4, which are cited as "SX-4.____."

V. Statement Regarding Oral Argument

Appellant does **not** request oral argument because the law is settled and the facts and the arguments are thoroughly presented in this Brief. But if the Court's decisional process will be aided, Appellant will be honored to present it. *See* Tex. Rule App. Proc. 39 (2018).

VI. Issues Presented

Issue 1: The trial court erred and abused its discretion by denying the Pretrial Application for Writ of Habeas Corpus Seeking Relief from Double Jeopardy because collateral estoppel prohibits the trial for Aggravated Assault with a Deadly Weapon since: (1) relevant facts were "necessarily decided" in the first trial (acquitted-case) for Manslaughter; and (2) such "necessarily decided" facts form an essential element of the pending trial for Aggravated Assault with a Deadly Weapon.

VII. Facts

1. Appellant is indicted in the case underlying this appeal (F15-72104) for Aggravated Assault with a Deadly Weapon

In the case underlying this appeal (F15-72104), Appellant indicted for Aggravated Assault with a Deadly Weapon under Tex. Penal Code § 22.02(a)(2) (2015) (CR.8, 70): on or about August 1, 2015, in Dallas County, Texas, Appellant intentionally, knowingly, and recklessly caused bodily injury to complainant Claudia Loehr by: operating a motor vehicle at a speed not reasonable or prudent for the conditions then-existing, failing to control the speed of the vehicle, and failing to keep a clear lookout and control of the vehicle, and then struck the vehicle occupied by the complainant. Further, the indictment alleges that Appellant used the vehicle as a deadly weapon during the alleged assault.

2. Appellant was acquitted of Manslaughter in Cause Number F15-71618

In Cause number F15-71618, Appellant was tried but acquitted of Manslaughter under Tex. Penal Code § 19.04 (2015) (CR.89) (acquitted-case). More on the acquitted-case below.

3. The sworn affidavit for the arrest warrant in the case underlying this appeal (for Aggravated Assault with a Deadly Weapon, F15-72104)

In the sworn affidavit for the arrest warrant in the case underlying this appeal for Aggravated Assault with a Deadly Weapon (F15-72104), it is alleged that on August 1, 2015 at about 5:35 p.m., Appellant was operating a black 2014 Dodge

Challenger, license-plate DSH2143, eastbound on the 5400 block of Arapaho in Dallas at a high rate of speed. (CR.9-11, 71073). The complainant Claudia Loehr was operating a tan 2006 Toyota Highlander westbound on the 5500 block of Arapaho. Loehr stopped in the left-turn lane at the red light that was being displayed by the stop-and-go signal facing westbound at the intersection of Arapaho and Prestonwood. Appellant allegedly failed to drive in a single lane of traffic and crossed over into the eastbound lane, colliding the front part of his Dodge into the front part of the Highlander. The force of the impact caused the Highlander to travel backwards 200 feet across three lanes of traffic, coming to a rest on the sidewalk in the 5500 block of Arapaho. (CR.71). Claudena Parnell was in the front passenger-seat of the Highlander. (CR.71). She was taken to Medical Center of Plano because of injuries she sustained, where she passed away. (CR.71).

4. Except for the identity of the complaining witness and the charged-offense, the indictment in the acquitted-case (F15-71618) alleges the same facts as those against Appellant in this case (F15-72104)

Under Cause Number F15-71618 (acquitted-case), Appellant was indicted for Manslaughter under Tex. Penal Code § 19.04 (2015) (CR.74): on or about August 1, 2015, in Dallas County, Texas, Appellant recklessly caused the death of Claudena Parnell (named in the F15-72104-indictment as the one who passed away) by operating a motor vehicle at a speed not reasonable or prudent for the conditions then-existing, failing to control the speed of the vehicle, and failing to keep a clear

lookout and control of the vehicle, and then struck the vehicle occupied by Parnell. Further, that indictment alleges that Appellant used the vehicle as a deadly weapon during the alleged assault.

When comparing the indictments, other than the complaining witness and charged-offense (i.e., Loehr sustained bodily injury while Parnell is deceased), the indictment and sworn affidavit (CR.75-77) in F15-71618 (acquitted-case) describes the same facts as the indictment in F15-72104 (this case). In fact, in the sworn affidavit for the arrest warrant for this case, the law-enforcement witnesses are Nathan Williams, James Ketelas, Oscar Garcia, Gregory Watkins, Floyd Burke, and Wendell Delaney, while Claudia Loehr is listed as a lay-witness. (CR.71-73). And in the sworn affidavit for the arrest warrant in F15-71618 (acquitted-case), the same law-enforcement witnesses are listed: Nathan Williams, James Ketelas, Oscar Garcia, Gregory Watkins, Floyd Burke, and Wendell Delaney, while Claudia Loehr is also listed as a lay-witness. (CR.75-77). In fact, other than a few differences and headings, it is difficult to differentiate the sworn affidavits for the two cases. Further, these are the same witnesses listed in the *State's List of Potential Witnesses* filed on April 6, 2018 in F15-71618 (acquitted-case). (CR.86-88).

5. Appellant moved for the cases to be consolidated into one trial, but the State refused, and the Court denied the motion.

After the State refused to agree to a consolidation of trials, Appellant filed motions before the trial of F15-71618 (acquitted-case) on October 21, 2016 and

March 3, 2017 to consolidate F15-71618 (acquitted-case) and F15-72104 (this case) into one trial, arguing (CR.78-84):

- Appellant is charged with Manslaughter under F15-71618 (acquitted-case) and Aggravated Assault under F15-72104 (this case). Both cases arise out of the same event and during the same time-frame. The allegations are intrinsic to each other. They are the same facts. Assertions in both cases would be the same, i.e., the alleged actus reas leading to the car-accident that caused injuries to both persons are the same.

- Appellant is probation-eligible on both cases, so the punishment would not vary.

- On or about September 21, 2016, trial counsel Lechtenberger went to the State to set both cases for jury trial. Mr. Lechtenberger was told by the State that only one case would be tried before the jury and that the other case would be "held back." Mr. Lechtenberger objected to this scheme.

- Judicial economy demands that the cases be tried at the same time. There is no valid reason that the court cannot or should not hear both cases in one proceeding.

- Trying the cases separately violates Appellant's rights under the Due Process Clauses of the Fifth and Fourteenth Amendment and his rights against cruel and unusual punishment under the Eighth Amendment.

On March 3, 2018, a hearing was held on Appellant's motion to consolidate. (CR145-154; RR2.4-13). After hearing arguments of counsel, the trial court denied the motions. (CR.85, 154; RR2.13).

6. The facts underlying Cause Number F15-71618 (acquitted-case) for Manslaughter are the same as the facts in F15-72104 (this case) for Aggravated Assault with a Deadly Weapon.

The jury trial for Manslaughter in F15-71618 (acquitted case) began on April 24, 2018. (CR.156). On April 26, 2018, the jury **acquitted** Appellant of Manslaughter. (CR.89). The witnesses who testified for the State during the trial of

the acquitted-case were Gregory Watkins, Jesse Cantu, John Loehr, Claudia Loehr, Sarah Hubbs, Douglas Johnson, William Cantwell, James Ketelas, Jill Urban, and Nathan Williams. (CR156-481). These are the same witnesses who are described in the sworn affidavit for the arrest warrant for both cases. (CR.71-73, 75-77).

On August 1, 2015 at about 5:30 p.m., an accident occurred on the 5400 block of Arapaho in Dallas at the intersection with Prestonwood involving a Dodge driven by Appellant and a 2006 Highlander driven by Claudia Loehr. (CR.164-172, 175-180, 183, 544-553, 557-558; RR3.9-17, 20-25, 28; RR6.SX1-SX7, SX10). Appellant was **not** intoxicated and nobody smelled an alcoholic beverage on Appellant. (CR.258-259, 270; RR3.103.104.115).

Appellant failed to drive in a single lane of traffic, crossed over into the eastbound lane, jumped the median, and collided into the front of the Highlander. (CR.176-180, 216-219, 237-241, 251-254, 557-558; RR3.21-25, 61-64, 82-86, 96-99; RR6.SX10). At the time of impact, Appellant was driving about 71 miles-per-hour. (CR.286-289, 600-630; RR3.131-134; RR6.SX34). The speed-limit on that section of Arapaho is 40 miles-per-hour. (CR.191; RR3.36).

The impact caused the Highlander to travel backwards about 200 feet and stopping on the sidewalk in the 5500 block of Arapaho. (CR.220, 238; RR3.65.83). The Highlander was facing westbound and the Dodge was facing southbound. (CR.176, 578-604; RR3.21; RR6.SX20-SX33).

The impact caused non-life-threating injuries to Ms. Loehr and life-threatening injuries to Claudena Parnell, who was riding in the front passenger-seat. (CR.172-174, 204-209, 219-225, 240-241, 268, 293-308; RR3.17-18, 49-54, 64-70, 85-86, 113, 138-153). Four days later, Ms. Parnell passed away at the Medical Center of Plano. (CR.207, 232, 294, 308, 631-638; RR3.52.77.139.153; RR6.SX-35).

7. After Appellant was acquitted of Manslaughter in F15-71618, the State insisted on proceeding with F15-72104 (this case) for Aggravated Assault with a Deadly Weapon. Thus, Appellant filed the Application.

Appellant alleged in the Application that he is entitled to relief under the Double Jeopardy Clause of the Fifth Amendment and its corollary doctrine of collateral estoppel, the Fourteenth Amendment, Tex. Const. Art. I, § 14, Tex. Const. Art. V, § 8, and Tex. Code Crim. Proc. Arts. 1.10, 11.01, 11.05, 11.08 and 11.23. Appellant also alleged that he unlawfully restrained of liberty by the Sheriff of Dallas County, Texas, being charged with Aggravated Assault with a Deadly Weapon under Tex. Penal Code § 22.02(a)(2) (2015). Finally, Appellant alleged that the restraint is illegal because Appellant's prosecution in F15-72104 (this case) for Aggravated Assault with a Deadly Weapon is barred by the Double Jeopardy Clause of the Fifth Amendment and its corollary doctrine of collateral estoppel, applicable to Texas through the Fourteenth Amendment, and the Texas constitutional and statutory provisions listed in the Application.

8. The trial court denies the Application, signs the State's Proposed Findings of Fact and Conclusions of Law, but continued the pending trial so that this issue can be determined by this Court

The trial court denied the Application. (CR.706). However, the trial court granted Appellant's motion to continue the pending trial so that this issue could be determined by this Court. (CR.708). The trial court also signed the State's Proposed Findings of Fact and Conclusions of Law ("FFCL"). (CR-Supp.4-21).

VIII. Summary of the Arguments

The trial court erred and abused its discretion by denying the Pretrial Application for Writ of Habeas Corpus Seeking Relief from Double Jeopardy because collateral estoppel prohibits the trial for Aggravated Assault with a Deadly Weapon since: (1) relevant facts were "necessarily decided" in the first trial (acquitted-case) for Manslaughter; and (2) such "necessarily decided" facts form an essential element of the pending trial for Aggravated Assault with a Deadly Weapon. Appellant will ask this Court to reverse the Order, remand the case, and order the trial court to grant the Application. Or, Appellant will ask this Court to grant the Application and dismiss the indictment in Cause Number F15-72104 for Aggravated Assault with a Deadly Weapon

IX. Argument

1. Issue 1: The trial court erred and abused its discretion by denying the Pretrial Application for Writ of Habeas Corpus Seeking Relief from Double Jeopardy because collateral estoppel prohibits the trial for Aggravated Assault with a Deadly Weapon since: (1) relevant facts were "necessarily decided" in the first trial (acquitted-case) for Manslaughter; and (2) such "necessarily decided" facts form an essential element of the pending trial for Aggravated Assault with a Deadly Weapon.

Introduction

Is collateral estoppel a real thing in Texas criminal cases? The trial court does **not** believe it is even though this case is a textbook-example of why collateral estoppel exists: to prevent the State from taking a second-shot at a defendant when that defendant asked the State to prosecute him for multiple charges arising out of the same event, and when that failed, asked the trial court to order the State to do so (by way of consolidation of trials). At minimum, the trial court applied Appellant's claim of collateral estoppel with a hypertechnical approach, which is prohibited under the Constitution. The judgment of acquittal in the acquitted-case was based upon a general verdict. Collateral estoppel required the trial court to examine the record of a prior proceeding, considering the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. A rational jury could not have so-grounded its verdict, so the trial court abused its discretion by denying the application.

This is **not** a matter of separate sovereigns or one where the defendant insisted that he **not** be tried in the same proceeding for multiple charges. **Nor** is this a matter of different burdens of proof, as the State's burdens of proof in F15-71618 (acquitted-case) for Manslaughter and F15-72104 (this case) for Aggravated Assault with a Deadly Weapon are the same: beyond a reasonable doubt.

Appellant never allege that Manslaughter and Aggravated Assault with a Deadly Weapon have the same elements. Rather, the issue is that: (1) relevant facts were "necessarily decided" in the first trial (acquitted-case) for Manslaughter; and (2) such "necessarily decided" facts form an essential element of the pending trial for Aggravated Assault with a Deadly Weapon.

And, by failing to prove beyond a reasonable doubt that Appellant committed Manslaughter, which requires a mens rea of recklessness, if allowed to go forward, the State must prove **from the same facts** that Appellant committed Aggravated Assault with a Deadly Weapon, which requires a mens rea of intentionally, knowingly, or recklessness.

Collateral estoppel, embodied in the Double Jeopardy Clause of the Fifth Amendment, is indeed a viable doctrine per the Supreme Court of the United States ("SCOTUS") and the Texas Court of Criminal Appeals ("TCCA"). Collateral estoppel exists as a constitutional protection against what the State is trying to do in this case: take a second-shot at a defendant and prosecute him after the State tried to

prosecute the defendant in a first trial (but lost in an acquittal) where the facts underlying the first trial and potential second trial are the same and the defendant begged to be tried for both charges in the same trial.

Appellant **never** argued that Aggravated Assault with a Deadly Weapon is a greater-or-lesser offense of Manslaughter. Or the other way around. Nor did Appellant argue that the *Blockburger* test applies here. The other issues the State raised and the trial court adopted are **not** relevant. All that is relevant is whether collateral estoppel still exists in Texas, and if it does, then Appellant must be granted the relief that the trial court denied him.

This case is properly before this Court

Pretrial habeas corpus is available to: (1) challenge the State's power to restrain the defendant; (2) challenge the manner of pretrial restraint (i.e., the denial of bail or conditions of bail; and (3) raise certain issues that would bar prosecution or conviction. *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex.Crim.App. 2016) ("Except when double jeopardy is involved, pretrial habeas is not available when the question presented, even if resolved in the defendant's favor, would not result in immediate release."); *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex.Crim.App. 2001) (same).

An interlocutory appeal is available for an application for pretrial habeas corpus based on double jeopardy-grounds. *Abney v. United States*, 431 U.S. 651, 662-663 (1977) (An order on a pretrial motion to dismiss an indictment on double

jeopardy grounds is immediately appealable); *Ex parte Robinson*, 641 S.W.2d 552, 554-555 (Tex.Crim.App. 1982) (same); *Saliba v. State*, 45 S.W.3d 329, 330 (Tex.App.-Dallas 2001, no pet.) (Exceptions to the general rule that appellate courts may consider an appeal by a criminal defendant only after conviction are where the defendant is on unadjudicated community supervision, the denial of a pretrial application for writ of habeas corpus alleging double jeopardy, and the denial of habeas corpus relief in extradition cases).

Appellant presented the evidence before the trial court that is necessary for this Court to decide the case

A hearing was **not** held in this case. This was the trial court's discretion and **not** Appellant's decision. However, attached to the Application in the *Appendix* were these documents (CR.68-90):

- Indictment in F15-72104 (this case) for Aggravated Assault with a Deadly Weapon
- Sworn affidavit for the arrest warrant in F15-72104 (this case)
- Indictment in F15-71618 (acquitted-case) for Manslaughter
- Sworn affidavit for the arrest warrant in F15-71618 (acquitted-case)
- Appellant's Motions to Consolidate F15-72104 and F15-71618 for one trial
- Order denying Appellant's Motions to Consolidate
- State's List of Potential Witnesses filed in F15-71618 (acquitted-case)

- Judgment of Acquittal in F15-71618 (acquitted-case)
- Docket sheet in F15-71618 (acquitted-case)

Further, Appellant also attached in an *Appendix for Reporter's Record* the entire record on appeal in F15-71618 (acquitted-case) for Manslaughter (CR.131-661):

- Volume 1: Master Index (RR1)
- Volume 2: Pretrial Hearing on March 3, 2017 (RR2)
- Volume 3: Trial held on April 24, 2018 (RR3)
- Volume 4: Trial held on April 25, 2018 (RR4)
- Volume 5: Trial held on April 26, 2018 with verdict (RR5)
- Volume 6: Exhibits volume (RR6)

Finally, the official court reporter filed exhibits with this Court under State's Exhibit 4, cited as "SX-4.____." These exhibits are from F15-71618 (acquitted-case), which are in the possession of the trial court. The entire record from F15-71618 (acquitted-case) was put before the trial court with the Application filed against F15-72104 (this case) for Aggravated Assault with a Deadly Weapon.

Thus, Appellant met his burden by introducing **not** merely "sufficient evidence" before the trial court and this Court, but rather he introduced the entire record from the acquitted-case, which shows that he has been placed in double jeopardy through the doctrine of collateral estoppel. *Guajardo v. State*, 109 S.W.3d

456, 460 (Tex.Crim.App. 2003) (The defendant bears the burden of demonstrating that the factual issue that he believes is barred from consideration was decided in the prior proceeding); *see also* *State v. Getman*, 255 S.W.3d 381, 384 (Tex.App.-Austin 2008, no pet.) (To decide a double jeopardy-issue, courts must determine: (1) what facts were necessarily-=decided in the first proceeding, and (2) whether those necessarily decided facts constitute essential elements of the offense in the second trial. For the issue to be barred, the fact or point of issue must have been determined in the prior proceeding. The entire record from the earlier proceeding should be examined to determine what fact or combination of facts were necessarily decided and which will then bar their relitigation. The defendant bears the burden of demonstrating that the factual issue that he believes is barred from consideration was decided in the prior proceeding.).

The standard of review for appeals of rulings on pretrial habeas corpus is abuse-of-discretion. If resolving the ultimate questions turn on applying legal standards, review is de novo.

An appellate court reviews the facts underlying a trial court's decision on a pretrial application for writ of habeas corpus in the light most favorable to the ruling and absent an abuse of discretion, upholds the ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex.Crim.App. 2006). An abuse of discretion does **not** occur unless the trial court acts "arbitrarily or unreasonably," "without reference to any guiding rules and principles," *see* *State v. Hill*, 499 S.W.3d 853, 865 (Tex.Crim.App. 2016), citing

Montgomery v. State, 810 S.W.2d 372, 380 (Tex.Crim.App. 1990), or unless the trial court's decision falls outside the "zone of reasonable disagreement." *Johnson v. State*, 490 S.W.3d 895, 908 (Tex.Crim.App. 2016).

An appellate court affords almost total deference to the trial court's determination of historical facts supported by the record especially if the fact findings are based upon credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997); *Ex parte Amezquita*, 223 S.W.3d 363, 367 (Tex.Crim.App. 2006) (same). Almost total deference is also afforded to the trial court's rulings on applications of law to fact questions if resolving those ultimate questions turns on evaluating credibility and demeanor. *Guzman*, 955 S.W.2d at 89.

But if resolving the ultimate questions turn on applying legal standards, review is de novo. *Guzman*, 955 S.W.2d at 89; *see also Ex parte Leachman*, 554 S.W.3d 730, 737-738 (Tex.App.-Houston [1st Dist.] 2018).

Double Jeopardy in general

No person shall be put in jeopardy of life or liberty twice for the same offense. U.S. Const. Amend. V; Tex. Const. Art. I, § 14; *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Double jeopardy protects a defendant from multiple prosecutions in cases where no final determination of guilt or innocence has been made but a mistrial was improperly declared or the trial has been terminated favorably for the defendant provided the

defendant has not sought the mistrial or termination. *United States v. Scott*, 437 U.S. 82, 95-100 (1978) (Double jeopardy not applicable where trial court terminated proceedings favorably to the defendant because of preindictment delay since the defendant chose to seek a termination of the proceeding). Appellant is also protected by Tex. Code Crim. Proc. Arts. 1.10 & 1.11 (2018) , which provide that no person shall be put in jeopardy of life or liberty twice for the same offense.

Collateral estoppel is embodied within Double Jeopardy

Collateral estoppel is embodied within the Double Jeopardy Clause of the Fifth Amendment, applicable to Texas through the Fourteenth Amendment. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970); U.S. Const. Amend. V; U.S. Const. Amend. XIV. Double jeopardy protects a defendant against a subsequent prosecution for an offense for which the defendant has been acquitted and collateral estoppel prevents relitigation of fact-determinations. *Reynolds v. State*, 4 S.W.3d 13, 19, 21 (Tex.Crim.App. 1999).

Collateral estoppel bars a subsequent prosecution if: (1) relevant facts were "necessarily decided" in the first proceeding; and (2) if such "necessarily-decided" facts form an essential element of the charge in the pending trial. *Ex parte Taylor*, 101 S.W.3d 434, 439-440 (Tex.Crim.App. 2002); *Murphy v. State*, 239 S.W.3d 791, 794 (Tex.Crim.App. 2007) (same); *Ex parte Watkins*, 73 S.W.3d 264, 268-269 (Tex.Crim.App. 2002) (same); *State v. Stevens*, 235 S.W.3d 736, 740

(Tex.Crim.App. 2007); *Ashe*, 397 U.S. at 443 (same); *Ex parte Lane*, 806 S.W.2d 336, 338 (Tex.App.-Fort Worth 1991) (Collateral estoppel requires the Court to examine the entire record of the prior proceedings to determine what issues were foreclosed). Collateral estoppel applies if the prior verdict was grounded upon an issue which the defendant seeks to foreclose from litigation and not whether there is a possibility that some ultimate fact has been determined adversely to the State. *Id*.; *see also* *Ladner v. State*, 780 S.W.2d 247, 250 (Tex.Crim.App. 1989) (collateral estoppel prohibits a subsequent prosecution if the matters to be relitigated dictated the previous acquittal and the factfinder could **not** rationally have based its verdict on an issue other than the issue the defendant seeks to foreclose).

Appellant notes that he refers to Cause Number F15-72104 (the pending case) for Aggravated Assault with a Deadly Weapon as the "pending case" rather than the "subsequently-tried" offense or case since the charge from which Appellant was filed (F15-72104) is pending.

Collateral estoppel is **not** to be applied with a hypertechnical approach. *Ashe*, 397 U.S. at 444. Rather, it is to be applied with "realism and rationality." If a judgment of acquittal was based upon a general verdict (as is usually the case), collateral estoppel requires a court to examine the record of a prior proceeding, considering the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that

which the defendant seeks to foreclose from consideration. *Id*. This inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id*., *citing* *Sealfon v. United States*, 332 U.S. 575, 579 (1948). Any test more technically restrictive would "simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id*. *See also* *Ex parte McNeil*, 223 S.W.3d 26, 29 (Tex.App.-Houston [1st Dist.] 2006) (discussion of how to apply collateral estoppel and **not** with a hypertechnical approach) and *State v. Sauceda*, 980 S.W.2d 642, 647 (Tex.Crim.App. 1998) (same).

Jeopardy attached when the jury was empaneled and sworn

The protection provided by the double jeopardy clause cannot be invoked unless jeopardy attached in a former proceeding. *Serfass v. United States*, 420 U.S. 377, 391-394 (1975). Because the acquitted-case was before a jury, jeopardy attached when the jury was empaneled and sworn, which is when Appellant was "put to trial." *Martinez v. Illinois*, 572 U.S. 833, 839-840 (2014); *Crist v. Bretz*, 437 U.S. 28, 37-38 (1978) (same); *State v. Proctor*, 841 S.W.2d 1, 4 (Tex.Crim.App. 1992) (same).

Collateral estoppel prohibits the trial for Aggravated Assault with a Deadly Weapon since: (1) relevant facts were "necessarily decided" in the first trial (acquitted-case) for Manslaughter; and (2) such "necessarily decided" facts form

an essential element of the pending trial for Aggravated Assault with a Deadly Weapon.

In Cause Number F15-72104 (this case), Appellant is charged with Aggravated Assault with a Deadly Weapon under Tex. Penal Code § 22.02(a)(2) (2015). (CR.8). The indictment alleges that Appellant intentionally, knowingly, and recklessly caused bodily injury to Claudia Loehr using his motor vehicle, which is alleged to be a deadly weapon. (CR.8).

Under Tex. Penal Code § 22.01(a)(1) (2015), a person commits Assault if the person intentionally, knowingly, or recklessly causes bodily injury to another. Aggravated Assault is Assault with an aggravating factor. Under Tex. Penal Code § 22.02(a)(2) (2015), a person commits Aggravated Assault with a Deadly Weapon if the person: (1) intentionally, knowingly, or recklessly (2) causes bodily injury to another and (3) the person uses or exhibits a deadly weapon during the commission of the assault. *See* *Mendez v. State*, 515 S.W.3d 915, 920 (Tex.App.-Houston [1st Dist.] 2017) (discussion of the elements of Aggravated Assault with a Deadly Weapon), *affirmed*, *Mendez v. State*, 545 S.W.3d 548 (Tex.Crim.App. 2018).

Under Tex. Penal Code § 19.04 (2015), a person commits Manslaughter if the person (1) recklessly (2) causes the death of an individual. Manslaughter is a result-oriented offense, so a defendant's culpable mental state must relate to the result of his conduct. *See* *Schroeder v. State*, 123 S.W.3d 398, 399-401 (Tex.Crim.App. 2003) (Discussion of the elements of Manslaughter and noting that it is "…difficult

to understand how a person may 'consciously disregard' a risk of which she is unaware.).

Reckless conduct requires a person to consciously disregard a *substantial and unjustifiable risk* that certain circumstances exist, or the result will occur. Tex. Penal Code § 6.03(c) (2015) (emphasis added). This conscious disregarding must be of such a nature and degree that it constitutes a *gross deviation* from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint. *Id*.; *see* *Bowden v. State*, 166 S.W.3d 466, 473-478 (Tex.App.-Fort Worth 2005) [The defendant acted recklessly because leaving young children alone in a room at night with a blocked window, a burning candle, and house that had no means of extinguishing a fire and had only one door was a gross deviation from the standard of care as provided by Tex. Penal Code § 6.03(c)]; *Lewis v. State*, 529 S.W.2d 550, 553 (Tex.Crim.App. 1975).

Thus, Aggravated Assault with a Deadly Weapon and Manslaughter do **not** have the same elements. They share only a possible mens rea of reckless conduct. Having the same elements is **not** the issue for collateral estoppel. Rather, the issue is whether: (1) relevant facts were "necessarily decided" in the first trial (acquitted-case) for Manslaughter; and (2) such "necessarily decided" facts form an essential element of the pending trial for Aggravated Assault with a Deadly Weapon.

The relevant facts that were "necessarily decided" in Cause Number F15-

71618 (acquitted-case) for Manslaughter that form an essential element of the pending trial for Aggravated Assault with a Deadly Weapon are:

- On August 1, 2015 at about 5:30 p.m., an accident occurred on the 5400 block of Arapaho in Dallas at the intersection with Prestonwood involving a Dodge driven by Appellant and a 2006 Highlander driven by Claudia Loehr. (CR.164-172, 175-180, 183, 544-553, 557-558; RR3.9-17, 20-25, 28; RR6.SX1-SX7, SX10). Appellant failed to drive in a single lane of traffic, crossed over into the eastbound lane, jumped the median, and collided into the front of the Highlander. (CR.176-180, 216-219, 237-241, 251-254, 557-558; RR3.21-25, 61-64, 82-86, 96-99; RR6.SX10).
    - **These facts were necessarily-decided against the State by the jury in the acquitted-case as insufficient as a matter of law for Manslaughter: (1) recklessly (2) caused the death of an individual (Ms. Parnell), and form these essential elements of Aggravated Assault with a Deadly Weapon: (1) intentionally, knowingly, or recklessly (2) causes bodily injury to another (Ms. Loehr) and (3) the person uses or exhibits a deadly weapon during the commission of the assault (Appellant's vehicle).**
- At the time of impact, Appellant was driving about 71 miles-per-hour. (CR.286-289, 600-630; RR3.131-134; RR6.SX34). The speed-limit on that

section of Arapaho is 40 miles-per-hour. (CR.191; RR3.36)

- **These facts were necessarily-decided against the State by the jury in the acquitted-case as insufficient as a matter of law for Manslaughter: (1) <u>recklessly</u> (2) caused the death of an individual, and form these essential elements of Aggravated Assault with a Deadly Weapon: (1) intentionally, knowingly, or <u>recklessly</u> (2) <u>causes bodily injury to another</u> and (3) the person <u>uses or exhibits a deadly weapon during the commission of the assault</u> (Appellant's vehicle).**

- The impact caused the Highlander to travel backwards about 200 feet and stopping on the sidewalk in the 5500 block of Arapaho. (CR.220, 238; RR3.65.83). The Highlander was facing westbound and the Dodge was facing southbound. (CR.176, 578-604; RR3.21; RR6.SX20-SX33). The impact caused non-life-threating injuries to Ms. Loehr and life-threatening injuries to Ms. Parnell, who was riding in the front passenger-seat. (CR.172-174, 204-209, 219-225, 240-241, 268, 293-308; RR3.17-18, 49-54, 64-70, 85-86, 113, 138-153). Four days later, Ms. Parnell passed away at the Medical Center of Plano. (CR.207, 232, 294, 308, 631-638; RR3.52.77.139.153; RR6.SX-35).

  - **These facts were necessarily-decided against the State by the jury in the acquitted-case as insufficient as a matter of law for**

Manslaughter: (1) recklessly (2) caused the death of an individual (Ms. Parnell), and form these essential elements of Aggravated Assault with a Deadly Weapon: (1) intentionally, knowingly, or recklessly (2) causes bodily injury to another (Ms. Loehr) and (3) the person uses or exhibits a deadly weapon during the commission of the assault (Appellant's vehicle).

It is also critical that in the acquitted-case for Manslaughter, the jury necessarily found against guild on the mens rea of recklessness, which is the only mens rea for Manslaughter since one **cannot** commit Manslaughter intentionally, knowingly, or with criminal negligence. Tex. Penal Code § 19.04 (2015) ("a person commits Manslaughter if the person (1) **recklessly**…) and *Schroeder*, 123 S.W.3d at 399-401. One can commit Aggravated Assault intentionally, knowingly, or recklessly. Tex. Penal Code § 22.02(a)(2) (2015). One **cannot** commit Aggravated Assault with criminal negligence. *See also* Tex. Penal Code § 22.01(a)(1) (2015) ("…a person commits Assault if the person intentionally, knowingly, or recklessly causes bodily injury to another," and Aggravated Assault is merely Assault with an aggravating factor of the use of a deadly weapon or serious bodily injury).

Thus, if the State failed to prove in F15-71618 (acquitted-case) for Manslaughter that Appellant acted recklessly, the fact that the evidence did not prove beyond a reasonable doubt that Appellant acted recklessly is a relevant fact that was

"necessarily decided" in the acquitted-case and this "necessarily decided" fact forms an essential element of the pending trial for Aggravated Assault with a Deadly Weapon since the State must prove that Appellant acted at least recklessly. If the State could **not** prove that Appellant acted at least recklessly in the acquitted-case, the State cannot prove this in the pending case, so collateral estoppel prohibits a trial of the pending case.

It is also relevant to add that **no evidence** was presented proving beyond a reasonable doubt that it was Appellant's conscious objective or desire to cause the accident. *See* Tex. Penal Code § 6.03(a) (2015). **Nor** was there any evidence presented proving beyond a reasonable doubt that with respect to the nature what occurred and his conduct that Appellant was aware of the nature of his conduct or that the circumstances exist, or with respect to a result of his conduct when he is aware that his conduct was reasonably certain to cause the result. *Id*.

Other facts that this Court should consider (but the trial court did **not**) are that in the sworn affidavit for the arrest warrant in the case underlying this appeal for Aggravated Assault with a Deadly Weapon (F15-72104), it is alleged that on August 1, 2015 at about 5:35 p.m., Appellant was operating a black 2014 Dodge Challenger, license-plate DSH2143, eastbound on the 5400 block of Arapaho in Dallas at a high rate of speed. (CR.9-11, 71073). The complainant Ms. Loehr was operating a tan 2006 Toyota Highlander westbound on the 5500 block of Arapaho. Loehr stopped

in the left-turn lane at the red light that was being displayed by the stop-and-go signal facing westbound at the intersection of Arapaho and Prestonwood. Appellant allegedly failed to drive in a single lane of traffic and crossed over into the eastbound lane, colliding the front part of his Dodge into the front part of the Highlander. The force of the impact caused the Highlander to travel backwards 200 feet across three lanes of traffic, coming to a rest on the sidewalk in the 5500 block of Arapaho. (CR.71). Ms. Parnell was in the front passenger-seat of the Highlander. (CR.71). She was taken to Medical Center of Plano because of injuries she sustained, where she passed away. (CR.71). These are the **same facts** presented in the trial of the acquitted-case. (CR.133-661).

Further, except for the identity of the complaining witness and the charged-offense, the indictment in the acquitted-case (F15-71618) alleges the same facts as those against Appellant in the pending case (F15-72104). In F15-71618 (acquitted-case), Appellant was indicted for Manslaughter under Tex. Penal Code § 19.04 (2015) (CR.74): on or about August 1, 2015, in Dallas County, Texas, Appellant recklessly caused the death of Ms. Parnell (named in the F15-72104-indictment as the one who passed away) by operating a motor vehicle at a speed not reasonable or prudent for the conditions then-existing, failing to control the speed of the vehicle, and failing to keep a clear lookout and control of the vehicle, and then struck the vehicle occupied by Parnell. Further, the indictment alleges that Appellant used the

vehicle as a deadly weapon. Other than the complaining witness and charged-offense (i.e., Loehr sustained bodily injury while Parnell is deceased), the indictment and sworn affidavit (CR.75-77) in F15-71618 (acquitted-case) describes the same facts as the indictment and sworn affidavit in F15-72104 (this pending case). The sworn affidavit for the arrest warrant for the pending case lists law-enforcement witnesses as Nathan Williams, James Ketelas, Oscar Garcia, Gregory Watkins, Floyd Burke, and Wendell Delaney, while Claudia Loehr is listed as a lay-witness. (CR.71-73). These are the same law-enforcement witnesses in the sworn affidavit for the arrest warrant in F15-71618 (acquitted-case) and Ms. Loehr is also listed as a lay-witness. (CR.75-77). As stated in the Facts above, other than a few differences and headings, it is difficult to differentiate the sworn affidavits for the two cases. And, these are the same witnesses listed in the *State's List of Potential Witnesses* filed on April 6, 2018 in F15-71618 (acquitted-case). (CR.86-88).

Thus, when considering the entire record in the acquitted-case and all the evidence presented with the Application, this Court should conclude that collateral estoppel prohibits the pending trial for Aggravated Assault with a Deadly Weapon since: (1) relevant facts were "necessarily decided" in the first trial (acquitted-case) for Manslaughter; and (2) such "necessarily decided" facts form an essential element of the pending trial for Aggravated Assault with a Deadly Weapon. The issues of ultimate fact have been determined by the valid and final judgment of acquittal

entered on April 26, 2018. Under collateral estoppel, these issues **cannot** again be litigated between the State and Appellant, and thus a trial for Aggravated Assault with a Deadly weapon should be prohibited. *Ashe*, 397 U.S. at 443-445; U.S. Const. Amend. V; U.S. Const. Amend. XIV; *Reynolds*, 4 S.W.3d at 19, 21; *Taylor*, 101 S.W.3d at 439-440; *Murphy*, 239 S.W.3d at 794; *Watkins*, 73 S.W.3d at 268-269; *Stevens*, 235 S.W.3d at 740). When this Court examines the entire record of the prior proceedings to determine what issues were foreclosed, it should find that the prior verdict was grounded upon an issue which the defendant seeks to foreclose from litigation and not whether there is a possibility that some ultimate fact has been determined adversely to the State. *Lane*, 806 S.W.2d at 338; *Ladner*, 780 S.W.2d at 250.

This Court should examine the entire record of the prior proceedings **not** with a hypertechnical approach but with "realism and rationality," *Ashe*, 397 U.S. at 444, this Court should find that the judgment in the acquitted-case was based upon a general verdict and a rational jury could **not** have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. *Id*.

This Court should also consider that Appellant pleaded for both cases to be tried in one proceeding but the State refused and the trial court denied Appellant's motion to consolidate the acquitted-case and pending case

As stated above, Appellant pleaded for both cases to be tried in one proceeding. Appellant's counsel asked the State for one trial on both causes on or

about September 21, 2016, but he was told by the State that only one case would be tried before the jury and that the other case would be "held back." So after the State refused to agree to a consolidation of trials, Appellant filed motions in F15-71618 (acquitted-case) on October 21, 2016 and March 3, 2017 to consolidate F15-71618 (acquitted-case) and F15-72104 (this pending case) into one trial, arguing (CR.78-84):

- Appellant is charged with Manslaughter under F15-71618 (acquitted-case) and Aggravated Assault under F15-72104 (this case). Both cases arise out of the same event and during the same time-frame. The allegations are intrinsic to each other. They are the same facts. Assertions in both cases would be the same, i.e., the alleged actus reas leading to the car-accident that caused injuries to both persons are the same.

- Appellant is probation-eligible on both cases, so the punishment would not vary.

- On or about September 21, 2016, trial counsel Lechtenberger went to the State to set both cases for jury trial. Mr. Lechtenberger was told by the State that only one case would be tried before the jury and that the other case would be "held back." Mr. Lechtenberger objected to this scheme.

- Judicial economy demands that the cases be tried at the same time. There is no valid reason that the court cannot or should not hear both cases in one proceeding.

- Trying the cases separately violates Appellant's rights under the Due Process Clauses of the Fifth and Fourteenth Amendment and his rights against cruel and unusual punishment under the Eighth Amendment.

On March 3, 2018, after a hearing on these motions to consolidate (CR145-154; RR2.4-13), the trial court denied the motions. (CR.85, 154; RR2.13).

As discussed in the Application, *Currier v. Virginia*, 138 S.Ct. 2144 (2018)

further strengthens Appellant's arguments. In *Currier*, police found a gunsafe that allegedly contained guns and $71,000 cash was reported stolen by Garrison. *Id*. at 2148. Most of the money was missing, and the police were led to Garrison's nephew, who confessed and implicated Currier. *Id*. A neighbor said she saw Currier leave the Garrison home around the time of the crime. *Id*.

Currier was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon (priors were for burglary and larceny). *Id*. Because the prosecution could introduce evidence of his prior convictions to prove the felon-in-possession charge, and worried that the evidence might prejudice the jury's consideration of the other charges, Currier and the government **agreed to a severance** and asked to try the burglary and larceny charges first, followed by the felon-in-possession charge in a second trial. *Id*. This agreement to a severance is in direct contrast to what occurred in Appellant's case, as Appellant begged the State and the trial court for a consolidated trial to **no** avail.

In the first trial, the government presented evidence from the nephew and the neighbor. The jury acquitted Currier. *Id*.

Before the second trial for the felon-in-possession charge, Currier argued double jeopardy, and in the alternative, asked the court to forbid the government from relitigating in the second trial issues resolved in his favor at the first (i.e., the court should exclude from the second trial evidence about the burglary and larceny).

Id. at 2148-2149. The motions were denied. The jury convicted Currier for the felon-in-possession charge. *Id*. at 2149. The Virginia appellate courts affirmed, and Currier sought review in the SCOTUS. *Id*.

The SCOTUS held that a defendant who moves for or agrees to a severance of charges may not successfully argue that a second trial violates the Double Jeopardy Clause (and by extension, any theory that is embodied in the Clause like collateral estoppel). Id. at 2155-2156. Contrast to *Ashe*, where the government tried the defendant of robbing one of six persons and lost, a second prosecution was held to violate the Double Jeopardy Clause. *Id*. In *Ashe*, because the first jury necessarily found that the defendant "was not one of the robbers," a second jury could not "rationally" convict the defendant of robbing the second victim without calling into question the earlier acquittal. Relitigation of the issue whether the defendant participated as "one of the robbers" would be tantamount to the forbidden relitigation of the same offense resolved at the first trial.

Unlike the defendant in *Ashe* and Appellant here, Currier **consented** to trying the cases separately and thus the second trial. The Double Jeopardy Clause concerns more than efficiency: it balances vital interests against abusive prosecutorial practices with consideration to the public's safety. *Id*. at 2156. Thus, a defendant who moves for or agrees to a severance of charges may **not** successfully argue that a second trial violates the Double Jeopardy Clause or collateral estoppel.

Had Appellant insisted on severance, then *Currier* would have allowed the State a second-shot at Appellant for the pending case (F15-72104) even though Appellant was acquitted of Manslaughter in the acquitted-case (F15-71618). However, this was **not** what happened. It was **the State** that insisted on two trials as the State wanted to "(hold) back" the pending case (F15-72104). The State's plan and scheme is what collateral estoppel is designed to prevent.

> ***Waters* (handed down by the TCCA in October 2018) applies only to cases where the first proceeding during which relevant facts were "necessarily decided" had a lower burden of proof for the State**

On October 31, 2018, the TCCA handed down *State v. Waters*, 560 S.W.3d 651 (Tex.Crim.App. 2018). The TCCA overruled the holding in *Ex parte Tarver*, 725 S.W.2d 195 (Tex.Crim.App. 1986), which held that if the State seeks to revoke a defendant's community supervision based on an alleged offense that is later charged in an information or indictment, and the trial court at the revocation-hearing finds the allegation to be "not true," the State is precluded from later prosecuting for that same alleged offense. This holding was based on collateral estoppel. *Id*. at 198-200.

In *Waters*, while Waters was on community supervision for an offense, she was arrested for DWI. *Waters*, 560 S.W.3d at 654. The State filed a motion to revoke her community supervision alleging that she violated the terms of her supervision by committing the DWI. *Id*. The trial court held a hearing on the State's motion to

revoke during which the State's sole evidence that Waters committed DWI was the testimony of community supervision officer Jetton. *Id*. Jetton was aware that Waters had been arrested for DWI but otherwise had **no** personal knowledge of the facts surrounding the DWI. *Id*. The trial court determined that the State had failed to prove by a preponderance that Waters committed DWI as alleged in the motion and found the allegation "not true." *Id*.

After this finding of "not true," the State filed an information charging Waters with the same DWI that had been alleged in the motion to revoke. *Id*. Waters filed a pretrial application for a writ of habeas corpus in which she contended that her prosecution for DWI was barred by collateral estoppel per *Tarver*. *Id*. at 654-655. Waters asserted that because the State had sought to revoke her community supervision based on the same DWI that was alleged in the information and the trial court at the revocation hearing found the allegation "not true," the State was precluded from prosecuting her for the DWI. *Id*. The trial court granted the pretrial habeas application and dismissed the information for the DWI. *Id*. Per *Tarver*, the court of appeals affirmed. *State v. Waters*, No. 02-16-00274-CR, 2017 Tex.App.-LEXIS 6195, *5-6 (mem. op.).

The TCCA reversed the court of appeals, holding that collateral estoppel is inapplicable following a "not true" finding at a revocation hearing. *Waters*, 560 S.W.3d at 657-658. The TCCA narrowed its ruling to the specific procedural

background of where a "not true" finding for a new offense at a revocation hearing is followed by a prosecution for that new offense, and distinguished *Ashe* and thus all collateral estoppel situations where the State subjects a defendant to criminal prosecution then follows with a second-shot at prosecution under circumstances that would have required relitigation of the same facts already found in his favor in the first trial (*Id*. at 659):

> "*Ashe* is distinguishable because, in that case, Ashe was subjected to criminal prosecution for an offense, followed by a second attempt at prosecution under circumstances that would have required relitigation of the same facts already found in his favor in the first trial. *Ashe*, 397 U.S. at 445-46. By contrast, the instant situation involves a revocation hearing followed by a first attempt at criminal prosecution, rather than successive criminal prosecutions involving the same facts. This distinction is critical because, unlike the initial proceeding in Ashe, in a revocation proceeding, the defendant is not on trial for the newly alleged offense. Rather, in a revocation proceeding, the central question is whether the probationer has violated the terms of her community supervision and whether she remains a good candidate for supervision, rather than being one of guilt or innocence of the new offense. Moreover, because guilt or innocence is not the central issue at a revocation hearing, a defendant does not face punishment for the newly alleged offense in that proceeding."

As the TCCA explained, under *Ashe*, the SCOTUS held that collateral estoppel is a component of the double jeopardy clause, and when an issue of ultimate fact has once been determined by a valid and final judgment, that issue **cannot** again be litigated between the same parties in a future lawsuit. *Id*. at 656. And, where a previous judgment of acquittal was based upon a general verdict, a court must examine the record of a prior proceeding considering the pleadings, evidence,

charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. *Id*. at 658-659.

Tarver and *Waters* involve a revocation hearing followed by a first attempt at criminal prosecution **rather than successive criminal prosecutions involving the same facts**, so in the "second-shot," the defendant is **not** on trial for the newly alleged offense. Thus, because there is **no** possibility of a new conviction and punishment arising from a revocation hearing, jeopardy does **not** attach for an offense that is alleged as a violation of the terms of community supervision in a revocation hearing, and double jeopardy protections are inapplicable.

Waters has **no** bearing on Appellant's case. The TCCA did **not** overrule collateral estoppel under the double jeopardy clause under *Ashe* and its progeny. Unlike in *Tarver* and *Waters*, Appellant's case does **not** involve a finding of "not true" of a new alleged crime at a revocation hearing followed by a subsequent prosecution for that new alleged crime. Also unlike in *Tarver* and *Waters*, if a second prosecution is allowed, Appellant will be subjected to criminal prosecution for an offense (the Manslaughter acquitted-case) followed by a second attempt at prosecution (for Aggravated Assault with a Deadly Weapon) under circumstances that would have required relitigation of the same facts already found in Appellant's favor in the first trial. Such a result violates *Ashe*, due process, and the double

jeopardy clause of the Fifth Amendment under the collateral estoppel doctrine.

A case that can be used for guidance

In an unpublished case, *Acuña v. State*, No. 13-13-00633-CR, 2016 Tex.App.-LEXIS 1898 (Tex.App.-Corpus Christi Feb. 25, 2016) (not designated for publication), the court of appeals was faced with a situation where the defendant had been acquitted of Murder yet the State later moved to try the defendant for Conspiracy to commit the same murder. *Id*. at *1. The court of appeals held that double jeopardy and collateral estoppel precluded a conviction for conspiring to commit the same murder because the first jury necessarily decided (under the law of parties) that defendant did not with the requisite intent encourage, direct, aid, or attempt to aid others by engaging in the specified acts and thus necessarily decided that defendant did not act "in pursuance of" an agreement to murder the victim, as required for conspiracy. *Id*. at *23-35.

What is similar between Appellant's case and *Acuña* is that the issue in both cases is simply whether: (1) relevant facts were "necessarily decided" in the first trial (acquitted-case) for (Murder in *Acuña* and Manslaughter here); and (2) such "necessarily decided" facts form an essential element of the pending trial for (Conspiracy to commit the same murder in *Acuña* and Aggravated Assault with a Deadly Weapon under the same facts here).

It was **not** relevant in *Acuña* whether Murder and Conspiracy to commit

Murder were similar under the *Blockburger* test. *See* *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not). Manslaughter and Aggravated Assault with a Deadly Weapon are **not** considered the "same" because "each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. Likewise, Conspiracy to commit Murder contains in fact two elements **not** contained in Murder. Murder under Tex. Penal Code § 19.02(b) (2018) requires the State to prove that the defendant (1) intentionally or knowingly (2) causes the death of an individual. However, Conspiracy to commit a Murder (or any crime) under Tex. Penal Code § 15.02(a) (2018) requires (1) intent that a felony be committed with (2) an agreement with at least one other person that they or one or more of them engage in conduct that would constitute the offense and (3) he or one or more of them performs an overt act in pursuance of the agreement. Thus, these are not the "same" under the *Blockburger* test.

Thus, the collateral estoppel-test is all that mattered in *Acuña* and it should be all that matters here. In *Acuña*, under *Ashe*, 397 U.S. at 445, the court of appeals held, "We believe Acuña has met her burden to establish that one of the essential elements of the conspiracy charge had been previously 'necessarily decided; in her

favor by a valid and final judgment…Accordingly, the trial court erred in denying her special plea insofar as it alleged that her conspiracy prosecution was barred by the doctrine of collateral estoppel, applicable through the Fifth and Fourteenth Amendments to the United States Constitution. *Id*. at *35. Thus, the court of appeals sustained Acuña's collateral-estoppel claim, and this Court should do this same with Appellant's collateral-estoppel claim.

X. Conclusion and Prayer

Appellant asks this Court to reverse the Order, remand the case, and order the trial court to grant the Application. Or, Appellant asks this Court to grant the Application and dismiss the indictment in Cause Number F15-72104 for Aggravated Assault with a Deadly Weapon.

Respectfully submitted,

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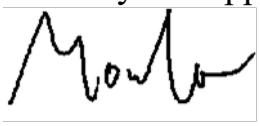
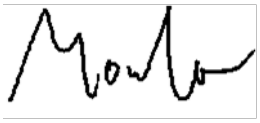


/s/ Michael Mowla
Michael Mowla

XI. Certificate of Service

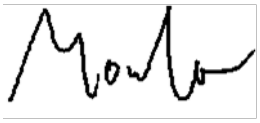
I certify that on July 1, 2019, a copy of this document was served on the Dallas County District Attorney's Office, Appellate Division, 133 N. Riverfront Boulevard, Dallas, Texas 75207 by Texas efile to brian.higginbotham@dallascounty.org and DCDAAppeals@dallascounty.org. *See* Tex. Rule App. Proc. 9.5 (2018).



/s/ Michael Mowla
Michael Mowla

XII. Certificate of Compliance with Tex. Rule App. Proc. 9.4

I certify that this document complies with: (1) the type-volume limitations because it is computer-generated and does not exceed 15,000 words. Using the word-count feature of Microsoft Word 2016, this document contains **8,600** words **except** in the following sections: caption; identity of parties, counsel, and judges; table of contents; table of authorities; statement of the case, procedural history, and statement of jurisdiction; statement regarding oral argument; issues presented section; signature; certificate of service; certificate of compliance; and the appendix; and (2) the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font. *See* Tex. Rule App. Proc. 9.4 (2018).



/s/ Michael Mowla
Michael Mowla